NO. 45961-2-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,
Respondent,

v.

GLENN T. HANSEN,
Appellant.

APPEAL FROM THE SUPERIOR COURT OF THE STATE
OF WASHINGTON FOR GRAYS HARBOR COUNTY

THE HONORABLE DAVID L. EDWARDS, JUDGE

BRIEF OF RESPONDENT

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Procedural Background

The defendant was charged by Information on August 15, 2013, with Trafficking in Stolen Property in the Second Degree (CP 1). The matter was tried to the court following waiver of jury trial, on February 5, 2014. (CP 4). The defendant was found guilty. The court entered written findings (CP 16-20). The defendant was sentenced on February 24, 2014. The court imposed a sentence of 90 days in jail (CP 21-28).

Factual Background

Despite the Assignments of Error made by the defendant to Findings 5 and 7, the facts are essentially undisputed and completely supported by testimony and evidence from the trial.

At the time of the incident herein, The Bank of Pacific was the owner of an abandoned saw mill located in Neilton, Washington that it had obtained through foreclosure proceedings. The mill sat on 20 acres of land and consisted of a saw mill, dry kiln and other buildings (CP 16, Finding of Fact 1).

When the mill was in operation, the Grays Harbor Public Utility District had installed a sub-station at the site to supply power to the

premises. Copper wire ran from the transformer installed by Grays Harbor P.U.D. through underground conduit to concrete vaults and from the vaults to the dry kiln and saw mill on the premises. The sub-station was disassembled in May of 2012, by Grays Harbor P.U.D. employees. Some of the wires were removed. Other wire, 750 MCM copper wire that ran from the transformer to one of the vault locations inside the mill, could not be removed and was left in place (CP 17, Finding of Fact 2).

Mr. Tyrone Palmer, the Commercial Property Manager for The Bank of the Pacific had the responsibility for checking on the premises on a monthly basis. On July 6, 2013, Mr. Palmer stopped by the premises and observed that all appeared to be in order. The concrete lids were on the vaults. On August 19, 2013, Mr. Palmer discovered that each of the vault lids had been removed and was sitting at an angle to the underground vault, exposing the interior of the vault. The wires leading into and out of each of the vaults were gone. He observed that the wires leading from the saw mill and the dry kiln to the vaults had been cut and removed from the conduit (CP 17, Finding of Fact 3). No one had given the defendant or anyone permission to remove the wire (CP 17, Finding of Fact 4).

On July 26, 2013, the defendant and Eric Maki showed up at Butcher's Scrap Metal in Hoquiam, Grays Harbor County, Washington,

with 346 pounds of large gauge copper wire. Immediately upon completion of the sale, the defendant was issued a receipt. The proprietress of the business, Ms. Middleton, was concerned enough that she immediately called Hoquiam Police. Detective Blundred arrived, observed the wire, and took a sample. That wire was later identified through the testimony of the P.U.D. employee as 750 MCM insulated copper wire that was consistent with the copper wire known to have been at the mill site after May of 2012 (CP 18, Finding of Fact 5, Exhibit 12, RP 36-38).

Eric Maki testified at trial that he and the defendant had been at the defendant's residence the day before the sale stripping the insulation from the wire sold to Butcher's Scrap Metal. At the time, the defendant was living in Neilton, approximately three to four miles from the mill premises and was self-employed in the business of scrapping metal (CP 18, Finding of Fact 5).

Sgt. Johansson of the Sheriff's Department spoke to the defendant, informing the defendant that he was there to talk to him about the stolen wire from the mill. The defendant told Sgt. Johansson that he would need to get dressed so that the officer could "take him in." The defendant also

said that he would take responsibility for what he had done and would not contest the charge (CP 18, Finding of Fact 7).

The defendant was re-interviewed and gave several different versions. Initially, he stated that he had been friends with Eric Maki for about 10 years and he just thought he was helping a friend. The defendant stated that it was his fault for making a bad decision. He told Johansson that he had been cleaning up scrap all around Neilton including scrap taken from another mill in Amanda Park. He did tell Johansson, however, that the wire sold to Butcher's Scrap Metal did not come from that other mill (CP 18, Finding of Fact 8).

Once placed under arrest and advised of Miranda rights, the defendant told Sgt. Johansson that during the evening hours on the day prior to the sale, he had received a phone call from Eric Maki who asked him to come pick him up on Highway 101 just South of the mill. He stated that when he arrived, the wire was sitting next to the road. He admitted placing the wire in the trunk of his car and selling it at Butcher's Scrap Metal the next day (CP 19, Finding of Fact 9). When later confronted with Maki's statement, the defendant told Sgt. Johansson that he had lied when he had admitted meeting Maki outside the mill and picking up the wire. (CP 19, Finding of Fact 9).

RESPONSE TO ASSIGNMENTS OF ERROR

(Response to assignments of error 1-4)

The Information gave the defendant sufficient notice.

The Information specifically alleged the language of the statute. (CP 1).. It specifically alleged that the defendant on the date in question, in Grays Harbor County, did "knowingly traffic in stolen property." This is sufficient to provide the defendant adequate notice. This issue has been dealt with in several contexts, including an Information charging Trafficking in Stolen Property in the same language as the case at hand. State v. Lindsey, 177 Wn.App. 233, 244, 311 P.3d 61 (2013).

> Article I, section 22 of the Washington Constitution provides in part, "In criminal prosecutions the accused shall have the right... to demand the nature and cause of the accusation against him." The Sixth Amendment to the United States Constitution provides in par, "In all...prosecutions, the accused shall... be informed of the nature and cause of the accusation." CrR 2.1(1)(a)(1) provides in part that "the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged."

Lindsey did not object to the sufficiency of the information or request a bill or particulars below. However, a challenge to the constitutional sufficiency of a charging document may be raised for the first time on appeal. *State v. Kjorsvik*,117 Wash.2d 93, 102, 812 P.2d 86 (1991). We review challenges to the sufficiency of a charging document de novo. *State v. Williams*, 162 Wash.2d 177 182, 170 P.3d 30 (2007). But where the defendant challenges the sufficiency of an information for the first time on appeal, this court construes the document liberally in favor of validity. *State v. Brown*, 169 Wash.2d 195, 197, 234 P.3d 212 (2010). Under this liberal construction rule, we will uphold the charging document if an apparently missing element may be "fairly implied" from the language within the document. *Kjorsvik*, 117 Wash.2d at 104, 812, P.2d 86. The test is: "(1) do the necessary facts appear in any form, or by fair construction can they be found, in the charging document; and, if so, (2) can the defendant show that he was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Kjorsvik*, 117 Wash.2d at 106-06, 812 P.2d 86.

Under the "essential elements" rule, a charging document must allege facts supporting every element of the offense in addition to adequately identifying the crime charged. *State v. Leach*, 113 Wash.2d 679, 689, 782 P.2d 552 (1989). "It is sufficient to charge in the language of a statute if it defines the offense with certainty." *State v. Elliott*, 114 Wash.2d 6, 13, 785 P.2d 440 (1990) (citing *Leach*, 113 Wash.2d at 686.

> 782 P.2d 552). The primary goal of the essential elements rule is to give notice to an accused of the nature of the crime that he must be prepared to defend against. *Kjorsvik*, 117 Wash.2d at 101, 812 P.2d 86 (citing 2 W. LAFAVE & J. ISRAEL, CRIMINAL PROCEDURE § 19.2, at 446 (1984);
>
> 1 C. WRIGHT, FEDERAL PRACTICE § 125, at 365 (2d ed.1982)). All essential elements of the crime charged, including nonstatutory elements, must be included in the charging document so that a defense can be property prepared. *Kjorsvik*, 117 Wash.2d at 101-02, 812 P.2d 86...
>
> Here, the information alleged that Lindsey knowingly facilitated in the theft of property for sale to others and trafficked in stolen property in violation of RCW 9A.82.050(1), quotes the statutes, identifies the stolen property, and alleges the applicable dates and county of the crime. Great specificity is not required, only sufficient facts for each element. ***Winings*, 126 Wash.App. at 85, 107 P.3d 141.** These details in the information, read liberally and in a common sense manner, were sufficient to give notice to Lindsey regarding the nature of the charges.

The same result was reached under different circumstances in State v. Winings, 126 Wn.App 75, 107 P.3d 141 (2005) in which the defendant was charged with Assault in the Second Degree. The defendant in

Winings, alleged that the charging document was insufficient because the victim was not named. Winings, 126 Wn.App at p. 83.

> Winings first contends that the information is factually deficient because it failed to identify the victim, the weapon used, or the circumstances that made the "weapon deadly." Br. of Appellant at 15. Winings is in error.
>
> A charging document must contain "[a]ll essential elements of a crime" so as to give the defendant notice of the charges and allow the defendant to prepare a defense. State v. Tresenriter, 101 Wash.App. 486. 491. 4 P.3d 145 (2000) (quoting *State v. Kjorsvik*, 117 Wash.2d 93, 97, 812 P.2d 86 (1991)) When, as here, the defendant challenges the charging document for the first time on appeal, we liberally construe the document in favor of validity. *Tresenriter*, 101 Wash.App at 491, 4 P.3d 145. Under the liberal construction rule, if an apparently missing element may be fairly implied from language within the charging document, we will uphold the charging document on appeal. *Tresenriter*, 101 Wash.App at 491, 4 P.3d 145. The test is: "(1) do the necessary facts appear in any form, or by fair contruction can they be found, in the charging document; and, if so, (2) can the defendant show that he or she was nonetheless actually prejudiced by the inartful language which caused a lack of notice?" *Tresenriter*, 101 Wash.App at 491 P.3d 145 (quoting *Kjorsvik*, 117 Wash.2d at 105-06, 812 P.2d 86).

> We distinguish between charging documents that are constitutionally deficient – i.e., documents that fail to allege sufficient facts supporting each element of the crime charged – and those that are merely vague. *State v. Leach*, 113 Wash.2d 679, 686, 782 P.2d 552 (1989). A charging document that states each statutory element of a crime, but is vague as to some other significant matter, may be corrected under a bill of particulars. *Leach*, 113 Wash.2d at 687 782 P.2d 552. A defendant may not challenge a charging document for "vagueness" on appeal of he or she failed to request a bill of particulars at trial. *Leach*, 113 Wash.2d at 687, 782 P.2d at 552.

The defendant did not challenge the information prior to or during trial. The information must now be liberally construed in favor validity. State v. Kjorsvik, 117 Wn.2d 93, 812 P.2d 86 (1991). The defendant was not confused. The facts arise from a one-time sale of stolen wire at a specific place and time.

Cases decided by the defendant do not apply to the case at hand. This is not a situation in which there were 20 "carbon copy charges of child rape, each identical to the other, none of which gave more than a range of time over which the offenses were alleged to have occurred." Valentine v. Konteh, 395 F.3d 626, 6th Cir., (2005). Similarly, this is not a case in which there were 14 separate counts of Theft and Trafficking in

Stolen Property for multiple victims. State v. Greathouse, 113 Wn.App. 889, 56 P.3d 569 (2002).

The defendant was not misled by the language of the information. He was not confused concerning the nature of the property. To grant relief herein would exalt form over substance. He could have asked for a bill of particulars but did not. This assignment of error must be denied.

There was ample evidence to support the corpus delicti of Trafficking in Stolen Property (Response to assignments of error 5-8, 12-14).

The facts are straight forward and undisputed. The Bank of the Pacific was the owner of a saw mill located at 4881 U.S. Highway 101, Neilton, Grays Harbor County, Washington. The bank had foreclosed on the premises and the mill was no longer operating (Finding of Fact 1). In May 2012, the Grays Harbor Public Utility District substation and junction that were on the site were disassembled and wires were removed. Some of the wires, particularly 750 MCM copper wire that ran from the transformer to one of the vault locations inside the mill, could not be removed (Finding of Fact 2, RP 45).

From time to time, the commercial property manager for the bank, Tyrone Palmer, would check on the premises. On July 6, 2013, everything was in order. When he went by on August 9, 2013, the vault lids had been

moved, exposing the interior of the vault. All the wires leading into and out of the vaults were gone, including the 750 MCM wire.

On July 26, 2013, the defendant sold 346 pounds of large gauge copper wire to Butcher's Scrap Metal in Hoquiam. This wire was 750 MCM, consistent with the copper wire known to have been taken from the mill site (Findings of Fact 5). Investigators spoke to Eric Maki, who testified at trial that he had been at the defendant's residence in Neilton before the sale of the wire. The two of them, according to Maki, stripped the insulation from the wire and then traveled to Butcher's Scrap Metal where they sold the wire the following day. At this time, the defendant resided in Neilton approximately three to four miles from the mill premises. The defendant was self-employed in the business of scrapping metal (Finding of Fact 5).

The State presented prima facia evidence that the wire sold to Butcher's Scrap was the wire stolen from the mill. Such wire is primarily used in industrial applications and in the words of the contractor, Brad Jones, "You just don't use it anywhere else" (RP 32, 33). In fact, there was a quantity of 750 MCM wire at the mill site at the time of the theft that the workers for the Public Utility District had been unable to remove when they tore down the transformer (RP 45). The wire, at the time of the

theft, was insulated. The defendant and Mr. Maki had stripped the wire (Finding of Fact 5). Coincidently, the defendant sold the wire on July 26, 2013, which coincides exactly with the time frame of the theft as established by Mr. Palmer.

In the first instance, it has long been established that it is not necessary for the State to identify stolen property as belonging to any specified individual. Convictions of larceny have been affirmed on the proof that the property involved did not belong to the defendant, while its actual ownership could not be positively shown. State v. Kruger, 145 Wash. 654, 261 p. 383 (1927).

All that is necessary is for the State to establish prima facia evidence that the property was stolen. Once that has been accomplished, then the statements of the defendant may be considered. This principle has been long established. See State v. Smith, 133 Ala. 145, 31 So. 806, 807-808 (1902).

> On the other hand, if the evidence affords an inference of the larceny of the goods, then the question of its sufficiency is one for the jury, and it becomes their province to determine whether the corpus delicti has been proven. In such case, evidence of possession by the prisoner of goods of the same kind as those charged to have been stolen is competent, and the jury must determine upon the entire evidence, not only

> the question of the doing of the act, but whether committed by the defendant. Indeed the corpus delicti must often be proved by circumstances. In the case at hand, the owners of the good charged to have been stolen were wholesale merchants. Garner, one of the partners, swears that meat and lard had been stolen from their storehouse. It is true he could not state definitely when these articles of merchandise were taken, and neither could he identify the meat and lard found in the possession of the defendant as the firm's property, nor could he say that particular lard and meat had been stolen from his storehouse. But he was positive that meat and lard had been stolen prior to the institution of the prosecution against this defendant. On this evidence, we are of the opinion that there was some proof tending to establish the corpus delicti, the weight and sufficiency of which was property left to the jury. Furthermore, we hold that it was sufficient to authorize the admission by the court of evidence of the possession by the defendant of meat and lard of the same kind as that which Garner said was stolen, and that the evidence of its identity was sufficient to be submitted to the jury, when taken in connection with all the other evidence in the case.

In the case at hand, the State established the fact of the theft. The State established the type of property that was stolen, a particular type of industrial copper wire. The State established the defendant's possession of the wire at his residence some three miles away from the theft site during

the time that the wire was stolen. The testimony at trial was that the defendant and his friend, Eric Maki, stripped the wire at his residence. The fact of the matter is that the defendant had 364 pounds of such wire. The defendant sold the wire during the time frame that the actual theft occurred. All of these facts lead to a logical and reasonable inference that the defendant was in possession of the stolen wire taken from the mill.

The State established prima facia evidence that wire was stolen from the mill. On these facts, plus the defendant's admissions, the trier of fact was permitted to find that the defendant knowingly sold the stolen property. Here is the defendant in possession of 640 pounds of stripped industrial wire. He certainly had information that would have led a reasonable person in the same situation to know that the wire was stolen. The defendant was convicted of Trafficking in Stolen Property in the Second Degree which is a lesser included mental state of knowledge and is quite apparent that he knew and disregarded a substantial risk that the property was stolen. In fact, the trial court believed that the defendant knowingly trafficked in stolen property (RP 2/24/14 page 4).

Once prima facia evidence is established that the property sold was stolen, the statements of the defendant may be considered. He initially told Sgt. Johansson that he thought he was helping his friend and that it

was his fault for making a bad decision (Finding of Fact 8). He said that he had been cleaning up at a different mill, but that this wire did not come from that mill (Finding of Fact 8). Eventually, following advisement of Miranda, the defendant told Sgt. Johansson that during the evening hours on the day prior to the sale, he had met Eric Maki on Highway 101 just South of the mill where they both loaded up the wire and put it in the back of the defendant's vehicle.

These facts established the defendant's knowledge that the wire was stolen. A transaction that took place on the side of the road late at night would certainly put him on notice, as a reasonable person, that the property was stolen.

In light of these circumstances, it is apparent that the defendant received effective assistance of counsel. Any such motion to dismiss for failure to establish the corpus delicti of the crime would properly have been denied by the trial court. Counsel for the defendant recognized this. Prima facia corroboration exists if the independent evidence supports a "logical and reasonable inference" of the facts the State seeks to prove. State v. Vangerpen, 125 Wn.2d 782, 796, 888 P.2d 1177 (1995). Reviewing the evidence in a light most favorable to the State, that standard had easily been met. The State presented evidence independent of the

defendant's incriminating statement to establish that the crime described in the defendant's statement occurred. State v. Brokob, 159 Wn.2d 311, 328, 150 P.3d 59 (2006).

This assignment of error must be denied.

Finding of Fact 5, Finding of Fact 7 and Conclusion of Law 2 are supported by substantial evidence (Response to Assignment of Error 9, 10 and 11).

The defendant asserts that Findings of Fact 5 and Finding of Fact 7 are not supported by evidence in the record. There is ample evidence to support all the factual findings of the court. As to Finding of Fact 5, the evidence at trial supported that on July 26, 2013, the defendant sold 346 pounds of large gauge copper wire to Butcher's Scrap Metal. This was established through the testimony of Lisa Middleton, an employee of Butcher's Scrap Metal (RP 4-6). He arrived there with Eric Maki (RP 22, 54). A sample of the wire was collected by Detective Blundred from the Hoquiam Police Department. It was identified at trial as 750 MCM copper wire, consistent with the copper wire known to have been at the mill site (RP 36-38). The wire recovered from the mill was measured by the P.U.D. employee, Michael Hinderlie, and found to be 750 MCM copper wire (RP 38, Exhibit 12). Eric Maki testified that the defendant lived in Neilton, a short distance from the mill. He also testified that the two of them had

stripped the insulation from the copper wire that they sold to Butcher's Scrap Metal (RP 53-54). Mr. Maki first saw it in the trunk of the defendant's vehicle and assisted in stripping the wire (RP 56).

As regards to Findings of Fact 7, Sgt. Johansson testified concerning the out-of-court statements of the defendant. The defendant's first response was to tell Sgt. Johansson, "Take me in" (RP 65). The defendant acknowledged to Sgt. Johansson that he was going to take responsibility for what he had done and he knew that he had made a mistake (RP 65).

As regards to Conclusion of Law 2, there was ample evidence to support a finding by the court that the wire sold by the defendant to Butcher's Scrap Metal was stolen and that it came from the victim's premises. The State's argument in that regard is set forth previously. Simply stated, there was a theft from the mill site. The reasonable evidence was that it occurred between July 6, 2013, and August 9, 2013 (Findings of Fact 3). The vault lids had been moved, exposing the interior of the vault. All the wires that had previously been there, including those that could not be removed by the P.U.D. the year prior, were now gone. This included 750 MCM wire. The wire sold by the defendant was of the

exact kind that was now missing. The corpus delicti, proof that the wire was stolen, has been made.

This assignment of error must be denied.

The court was required to hold a restitution hearing before awarding restitution (Response to Assignments of error 15 -17).

The amount of restitution was established at trial through the testimony of witness Brad Jones. The State concedes that the amount of restitution was set without the opportunity for the defendant, through counsel, to cross-examine the witness or present evidence of his own regarding value. The defendant is entitled to a separate restitution hearing. State v. Raleigh, 50 Wn.App. 248, 254, 748 P.2d 666 (1988). Likewise, the defendant is entitled to a hearing if he objects to the amount of restitution. State v. Gray, 174 Wn.2d 920, 924-25, 280 P.3d 1110 (2012); RCW 9.94A.753.

A criminal defendant may only be ordered to pay restitution for losses that are causally connected to the offender's criminal acts unless the offender expressly agrees to pay restitution for crimes of which he or she was not convicted. State v. Griffith, 164 Wn.2d 960, 195 P.3d 506. Thus, for example, a defendant convicted of Possession of Stolen Property may not be ordered to pay restitution for damages associated with a burglary

from which the property was taken. Griffith, supra. Under these facts, the court can order restitution to The Bank of Pacific for the loss associated with damage done by the defendant to the wire while in his possession. This would include at a minimum, the cost to replace the wire which had been stripped. See State v. J.T., 139 Wn.App. 915, 163 P.3d 796 (2007).

The trial court was entitled to order attorney's fees (Response of Assignments of error 18-20).

This issue has been long settled. RCW 10.01.160 authorizes the trial court to impose costs and attorney's fees on a convicted indigent defendant if he was able to pay, or will be able to pay. The court may nevertheless order attorney's fees as long as certain safeguards are met, State v. Barklind, 87 Wn.2d 814, 817-18, 557 P.2d 314 (1976). Quite simply, such courts may be ordered as long as the repayment is not mandatory, there is a likelihood that the defendant will be able to pay, the defendant is permitted to petition the court for remission of the payments and the defendant cannot be held in contempt or in violation of the Judgment and Sentence unless there is an intentional refusal to obey the court order or failure to make good faith effort to make repayment. See also, State v. Eisenman, 62 Wn.App. 640, 810 P.2d 55 (1991).

The court does not have to make a specific finding at the time of sentencing that the defendant will have the ability to pay in the future. The courts have held that statues like RCW 10.01.160 regarding assessment of attorney's fees are constitutional and comply with the standards of the United States Supreme Court. See Fuller v. Oregon, 417 U.S. 40, 40 L.Ed.2d 642 (1974).

This assignment of error must be rejected.

CONCLUSION

For the reasons set forth, the conviction must be affirmed.

DATED this 1 day of October, 2014.

Respectfully Submitted,

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GRAYS HARBOR COUNTY PROSECUTOR

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